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DIVINE DIRECTION TO BREAK A PROMISE OF MARRIAGE.

The Supreme Court of Minnesota, in speaking of defendant in a breach of promise suit said: "He seems to have prayed for light and to have received advices from above that it was God's will that they should part. Such a command may salve the conscience of the breaker, but it may not serve as an excuse in law for the breach." Hinely v. Gollnick, 144 N. W. 213.

We rather take this as meaning that to Caesar belongs the obligation to pay the money penalty for the breach, and to conscience its commission, rather than as insinuating that the answer to prayer was heard as the devotee was trying to hear it. The jury may have looked at it in the latter way and given to smug piety its deserts.

JUDGMENT FOR PENALTIES AND THE FAITH AND CREDIT CLAUSE.

If the Attorneys General of Illinois and Missouri are correctly reported by the Associated Press, they are not talking in lawyerlike way upon the question of the enforceability or not of judgments for penalties against certain lumber companies ousted from the state of Missouri. The Illinois officer says judgments for penalties criminal in their nature will not, for reason of comity, be enforced by the courts of a sister state. The Missouri officer says comity is the other way.

So far as comity is concerned, Huntington v. Arill, 146 U. S. 617, is with the Illinois officer, if there is *suit* for such a penalty. Here the real question is whether or not a *judgment* for a penalty, even one criminal in its nature, is protected by the faith and credit clause of the constitution. As we read Converse v. Hamilton, 224 U. S. 243, it is.

RIGHT OF ACTION ON CONTRACT LAWFUL WHEN MADE WHERE BY CHANGE OF LAW ITS PERFORMANCE HAS BEEN MADE UNLAWFUL.

As may be remembered the Supreme Court held in the case of Louisville & N. R. Co. v. Mottley, 219 U. S. 567, 34 L. R. A. (N. S.) 671, that an agreement upon lawful consideration, when made, for an interstate carrier to furnish one with annual passes for the balance of his life could not be further performed after the enactment of the Hepburn Act. It was said in the opinion in that case that: "Whether, without enforcing the contract in suit, the defendants in error may by some form of proceeding against the railroad company, recover or restore the rights they had when the contract was made, is a question not before us, and we express no opinion on it."

Following after this case two suits have arisen in state courts where equitable relief was asked, both rescission and damages for non-performance being denied in one case; in the other, damages for refusal of further performance were adjudged. Cowley v. Northern Pac. Ry. Co., 68 Wash. 558, 123 Pac. 998, 41 L. R. A. (N. S.) 559; Louisville & N. R. Co. v. Crowe (Ky.), 160 S. W. 759.

Though the Federal Supreme Court seems to intimate, *arguendo*, that there might exist some right of recovery on the part of the promissee for failure of performance, because subsequent law forbade, it was also said in the opinion that: "The agreement . . . must necessarily be regarded as having been made subject to the possibility that, at some future time, Congress might so exert its whole constitutional power in regulating interstate commerce as to render that agreement unenforceable or impair its value." It would seem, therefore, that it might also be said, that this possibility was in the minds of the parties at the time the agreement was made and was, so to speak, discounted by them, the railroad offering merely to do in per-

formance whatever should continue to be lawful, and the other party impliedly agreeing to take his chances on lawfulness in performance continuing through the life of the contract.

The Washington court did not, in its opinion, express this idea, but went upon the theory that one only has a right of action against another when there is a right, legal or equitable, in one party and a wrong in the other party, and then concludes that the two essentials of a right of action did not exist in the case before it, because there was lawful excuse for non-performance. It quotes from Fitzgerald v. Grand Trunk R. Co., 63 Vt. 169, 13 R. L. A. 70, 22 Atl. 76, as follows: "The obligation of a contract in law is that element of duty or promise which a party may be compelled to perform. If performance cannot be compelled, there is no legal obligation in the contract."

These general principles, if even they are not to be called universal, ought to obtain in equity as well at law, if we are to conserve another principle—equity follows the law.

But they are just anyway, if our deduction about the doctrine of chances, above stated, is fair. Certainly there was in the two state cases a good vesting of the titles in the railroads to the land for right of way that was conveyed, and the other parties knew it was being devoted to public purposes, and further knew that by agreement they escaped the railroads' right to exercise the power of eminent domain. Therefore, it would seem there was excellent ground for estoppel, even if any vested rights should be disturbed by any future change of law.

There were here, then, agreements fully executed on the one part and executory, as depending upon performance continuing to be lawful, on the other part. Where then, by implied agreement, was the possibility, of which the Federal Court speaks, resting? Certainly it would seem to have been assumed by him in whose behalf performance was to ensue. Can this possibility be regarded in any other light than a condition subsequent, for non-compliance with which ordinarily there is a remedy in damages, not available, however, in this case, because performance was excused?

The Kentucky Court said: "Here appellee in good faith conveyed and delivered up the possession of his land in consideration of the promise of his vendee to pay for the same in a particular thing, an annual pass. This was, in effect, a contract to pay appellee the purchase price of his land in annual instalments, during the remainder of his life, instead of in one lump sum at the time of the execution of the deed. . . . This consideration has not been fully paid."

We desist a moment in quotation to say this statement is not legally accurate. There underlay the face of the agreement the possibility to which we have alluded, and had it have been expressed and not merely implied, no one would say "this consideration has not been fully paid."

The court then proceeds, after, as we think, begging the real question in the case, and says: "But rather than do appellee the injustice of declaring a forfeiture of the unfulfilled contract by a release and discharge of appellant from all liability thereunder, some other medium of payment should, in good conscience, be substituted for the medium which is no longer available; or appellee should recover or be restored to the rights he had when the said deed was executed by him."

The latter alternative sounds very radical, indeed, and the former fails to impute to appellee what he must be deemed to have known when he executed the deed, that is to say, that Congress might declare that the performance for which he contracted could not lawfully be rendered. We are not surprised that the court cites no authority for its conclusion, for we do not believe any may be found. The appellee knowing what he must be presumed to have known should have provided against its happening, if the chance, which by presumption of law he assumed, was not by him intended to be assumed.

NOTES OF IMPORTANT DECISIONS.

UNIFORM SALES ACT—NOTICE OF INTENTION TO RESELL ON PURCHASER'S DEFAULT.—Two recent cases are in agreement upon the proposition that where a purchaser refuses to perform his agreement to purchase, the seller need not give notice of intention to resell, so as to entitle him to recover the difference between the contract price and the price on resale. Felton v. So. Flour & Grain Co., (Ga. Ct. of App.) 78 S. E. 1074; Leeper v. Schroeder, (Colo.) 132 Pac. 701.

Annotation of these cases in Michigan Law Rev. December, 1913, and Columbia Law Rev. December, 1913, points out however, that there is great conflict in decisions among the states, and conflict also existing among text writers, as vide 3 Benj. on Sales 1023 and Mechem on Sales, sec. 1624. The latter work qualifies the general rule where goods are perishable or other special circumstances would render notice impracticable or unavailing. Under these circumstances it is seen how desirable it is that the Uniform Sales Act, prepared by the Commissioners on Uniform Laws and already adopted by ten states, should be enacted by others. This seems especially true because, also, of the excellence in itself of this act.

This part of the act seeks to protect both the seller and purchaser from loss and to hold the former to the utmost good faith in the exercise of right of resale and, whether he so acts or not, to prevent any complication so far as purchaser on resale is concerned.

COMMERCE—INHIBITION ON INTERSTATE RAILROAD TRANSPORTING ITS OWN COMMODITIES.—The Supreme Court holds that a railroad owning a mine may not transport from one state to another articles purchased by it for use in the operation of its mine, under the Hepburn Act making it unlawful so to do except as to an article for use in the conduct of its business as a common carrier. Delaware L. & W. R. Co. v. United States, 34 Sup. Ct. 65.

In this case there was a purchase of hay for the use of animals employed in and about the mines, and it was ruled that the case was within the ruling of U. S. ex rel. Atty. Gen. v. Delaware & L. Co., 213 U. S. 366, 53 L. Ed. 835, where there was shipment from mine to market, this case being of shipment from market to mine. The court said the statute "includes inbound as well as outbound shipments. Both classes of transportation are within the purview of the evil to be corrected, and therefore subject to the power of Congress to regulate interstate commerce."

It seems to us that the statute itself aims at, rather than corrects, the evil, it being so easy of avoidance where interstate traffic has no corresponding legislation. Thus for shipment in either direction delivery could be made at or near a state boundary.

But even, if this might be thought a mere attempt at evasion, not to be recognized, yet the supposed evil would merely invite subscription to stock in a mining corporation by holders of stock in the railroad and then interlocking directorates making the mine a feeder to the railroad even at a loss to itself.

A problem also might be presented if only one route to a railroad-owned mine, and the railroad were forbidden to resort to the plan first above suggested, it might have to shut down. There is such a way open to evasion or to damage if this is prevented, that, the analysis of logic is to prevent any private business by a common carrier at all. This is the only way to make it serve the public faithfully.

STATUTE OF FRAUDS—RIGHT TO INVOKE AS A SHIELD FOR FRAUD.—The Supreme Court of Nebraska has pushed the principle that the statute of frauds as rendering a contract non-enforceable, cannot be invoked to cover fraud, to its verge, in the recent case of Maule v. Cole, 144 N. W. 247.

The facts in this case show, that plaintiff was the owner of lot 7 lying between 6 and 8 of a certain block, which two lots were owned or to be acquired by an investment company. It desired to erect a large hotel building on lots 7 and 8 and proposed an exchange of lot 6 for lot 7. She referred it to defendants as her agents in the matter.

It proposed to them a cash difference of $40,000, less $1,000 for commission, to effect an exchange, the building on lot 7 to be moved to 6 at plaintiff's expense. The agents told plaintiff the offer of difference was $8,000, and the trade fell through. She sued them for loss of the bargain. Among other things defendants pleaded, that the corporation of which they were officers had a lease on lot 7 and it had only agreed verbally to surrender its lease.

The court said: "The plaintiff's agreement with the corporation provided that the expenses of removal and any other loss that the corporation might suffer should be reimbursed by the plaintiff. The contract was a fair one so far as the interests of the corporation were

involved. It was not void as being malum in se. If the plaintiff could consummate the exchange of so much advantage to her, it would be a gross breach of faith on the part of the corporation to refuse to perform its agreement and wantonly cause great loss to the plaintiff. These plaintiffs surely are not in a position to assert that the corporation would refuse to perform its contract for the sole purpose of enabling them to avoid liability for their misconduct. If the plaintiff could have made the exchange but for the fraud of the defendant, she was entitled to recover the damages caused by that fraud."

There is rather more of indignation in this excerpt, than analysis in reasoning. The burden seemed to be on plaintiff to show, in all reasonable probability, that the corporation would have complied with its verbal agreement had these agents acted in good faith. If their bad faith was shown to be the proximate cause of the bargain being lost it seems true that plaintiff was injured. The verbal agreement, however, counted for nothing save as being evidentiary in the circumstances surrounding the negotiations. As a matter of fact the statute of frauds seems not to have been really involved at all.

PURPRESTURE.

According to Lord Coke, purprestur is a close, or enclosure, and is committed when one makes several to himself that which ought to be in common to many, as if one were to build between high and low water mark on the side of a navigable river. It is an invasion of the King's *jus privatum,* or private property in the soil covered by water. It is laid down by all the old writers that it might be committed either against the King, the lord of the fee or any other subject. A purprestur in navigable waters is not a nuisance unless it interferes with navigation. It may be abated by the Crown, or the owner of the shore, or restrained by injunction at the suit of the Attorney-General, whether it creates a nuisance or not. The remedy for the Crown was either by an information of intrusion at the common law, or by an information at the suit of the Attorney-General in equity. In case of a judgment upon information of intrusion, the erection complained of, whether it was a nuisance or not, was abated. But upon a decree in equity, if it appeared to be a mere purprestur, without being at the same time a nuisance, the court might direct an inquiry to be made whether it was more beneficial to the Crown to abate the purprestur, or to suffer the erection to remain and be arrented. It has been generally recognized by the courts, that wharves are almost as essential to commerce as the waterways themselves. The proceeding at the common law to obtain leave to build a wharf on the King's title land was by a writ of *ad quod damnum,* to ascertain what injury would ensue. Upon the return of a favorable verdict, the proposed work was authorized by the King's license. Without such a writ, and a favorable inquisition thereon, those who erected such purprestures, did it at their peril and took the risk of the structure being pronounced a nuisance, or abated. The owner of the submerged soil (the Crown in England, and the state in this country) at common law, had the right to say whether or not he would allow the owner of the adjoining dry land, to build out a wharf into the water, on the soil of the former. A legal grant from the Crown cannot make an erection in a navigable river for private purposes legitimate, for the reason that the right of the public to the unobstructed use of navigable waters is paramount to any right of property in the Crown. The distinction between a purprestur and a nuisance seems to be this: Where any invasion of the *jus privatum* (private property) of the Crown, in arms of the sea, or ports, takes place by encroachment on the soil, it is a purprestur. Where the *jus publicam* (public right) is violated it is a nuisance. There is a broad distinction between the violation of a public right, and an invasion of the proprietary rights of the Crown. The one creates a public nuisance, the other a purprestur. A purprestur purely is not indictable. The remedy is by information in

equity at the suit of the Attorney-General, or other proper officer. But where an encroachment is both a purpresture and a public nuisance it is indictable, abatable and punishable as the latter. If a littoral proprietor without a grant or license from the Crown extends a wharf, or building into the water in front of his land, it is a purpresture and if the public rights of navigation and fishery are not impaired, it is not a public nuisance.

The title to lands under tide waters in this country, which before the revolution was vested in the King, became, upon the separation of the colonies, vested in the states in which they were situated. The people in the state in their right of sovereignty, succeeded to the royal title, and through the legislature may exercise the same powers, which previous to the revolution could have been exercised by the King alone, or by him in conjunction with parliament, subject only to those restrictions which have been imposed by the constitution of the state or of the United States. The state in the place of the Crown holds the title of trustee of a public trust; but the legislature may, as the representative of the people, grant the soil, or confer an exclusive privilege in tide waters, or authorize a use inconsistent with the public right, subject to the paramount control of congress through laws passed in pursuance of the power to regulate commerce given by the constitution.[1] Such grants are made in the State of New York under the direction of the commissioners of the land office. They are necessary adjuncts and incidents to commerce, but the erection of wharves, etc., by the owners of the adjacent upland on the soil of the state under tide water, constitutes a purpresture for which a remedy by abatement can be had by an action in equity at the instance of the Attorney-General.[2] A structure built out below high water mark and into the navigable waters of a bay is unquestionably a purpresture and a nuisance. The state can undoubtedly compel its removal, but so long as it remains, the occupant is entitled to its possession and may collect wharfage. A littoral owner cannot maintain a structure upon lands covered by waters of an estuary of the sea, or of a navigable tide water stream unless he first obtains a grant of such lands.

The state holds the absolute right to all navigable waters within its boundaries and the soils under them, subject, of course, to any rights in them which it may have surrendered to the general government.[3] The soil she holds as trustee of a public trust for the benefit of the people, and she may by her legislature grant it to an individual, but she cannot grant the rights of the people to the use of the navigable waters flowing over it; these are inalienable. Any grant to the soil, therefore, is subject to the paramount rights of the people to the use of the highway. "The *jus privatum*" says Lord Hale, "must not prejudice the *jus publicam* wherewith the rivers and arms of the sea are affected to public use." There can be no claim of right derived from prescription and the statute of limitations, for a right to continue a public nuisance cannot be acquired by prescription. Against it, however long continued, the state is bound to protect the people, and for that purpose, the Attorney-General, as the law officer of the state, has the power to institute a proceeding in equity in the name of the people to compel the discontinuance of the acts which constitute the nuisance.

Under the common law as declared in the case of Shively v. Bowlby (152 U. S. 1) and fully sustained by the authorities, it is apparent that an owner of premises bounded on a lake, takes no title to any submerged lands under the waters of the lake, nor does he by virtue of being a shore owner, have any right to construct piers upon the submerged lands, without the consent of

(1) People v. N. Y., Etc., Ferry Co., 68 N. Y. 71.

(2) People v. Mould, 52 N. Y. Supp. 1032.

(3) Martin v. Waddell, 16 Peters 410.

the state. The question involved in the Revill case was, whether the riparian owner had the right to build piers out in the water in order to protect the shore of his land from erosion. This right was denied and the court remarked: "As we understand the common law, any structure placed upon the land of the state below or beyond the water's edge in the waters of the lake is a purpresture and may be abated in a proceeding instituted in behalf of the people.[4] After a careful reading of the authorities we see no reason to recede from the position taken in the Revill case, and are satisfied that by the common law, unmodified by local usage, custom or statute, a riparian owner had no right to build any structures on the submerged lands in front of his own lands, unless he owned such submerged lands, or had a license to do so. The title of the owner to such submerged lands is not burdened with an easement in favor of the owner of the adjoining upland to build wharves out to navigable water. Such being the common law it is the law of the state until altered by the legislature."[5] To permit one to erect piers to prevent erosion would be injurious to the state, for the effect would be to add new land to the premises of the shore owner. The accretions would extend the boundaries of the premises into the lake, and thus the shore owner's land would be increased and the land belonging to the state would be diminished. This being so it cannot be said that the construction of piers or other buildings is not injurious to the state. One has no right to build piers, or "wharf out" into the lake, for the purpose of making land or increasing the boundaries of his premises, nor has he the right to do anything that would produce this result. The lands covered by the waters of the lake belong to the state and no one has the right by any device whatever to extend his boundary line below high water mark, and when he does so he inflicts an injury on the rights of the state, which can be inquired into and abated in a court of equity on the application of the Attorney-General.

Touching the riparian rights of the shore owner, the law, as it exists at common law, is that where land bordering on the lake gradually and imperceptibly encroaches on the water, the accretion thus made belongs to the shore owner. He has another riparian right from his land to the lake—in other words the right to pass to and from the waters of the lake within the width of his premises as they border on the lake. This right cannot be taken or diverted from the riparian owner without just compensation being made therefor, as provided by law. These are the only common law riparian rights possessed by the shore owner, although other rights may exist in the various states by statute, usage or custom. If a riparian owner has intruded into the water beyond the point of navigability and filled up the bed of the stream beyond that point for the sole purpose of extending his possessions so as to obstruct and interfere with the public right of navigation a purpresture is thereby constituted, which the public would have the right to abate as a public nuisance. His act would give him no additional rights, nor would it forfeit or destroy his riparian rights as they before existed.[6]

The same doctrine as to the dominion and ownership of lands under the navigable waters of the great lakes or other navigable lakes applies which obtains at the common law as to dominion and ownership of land under tide waters on the borders of the sea, and the lands are held by the same right in the one case as in the other and subject to the same trusts and limitations.[7] It is true that the state holding the title to the lands covered by the waters of the lake does not hold it subject to barter and sale, but holds it in trust in its sovereign capacity for the people of the entire state for

(4) Revill v. The People, 177 Ill. 468.
(5) Cobb v. Comrs. of Lincoln Park, 202 Ill. 433.
(6) Union Co. v. Brunswick, 31 Minn. 301.
(7) Illinois Cent. Ry. Co. v. Illinois, 146 U. S. 387.

the purpose of navigation and fishery. The governmental power of the state over these lands cannot be relinquished or given away. The trust imposed upon the state must be kept and faithfully observed.[8]

In the case of Dana v. Jackson St. Wharf Co. 31 Cal. 118, the plaintiff owned a water lot in San Francisco immediately abutting upon the water front as established by the act of the legislature of 1851. The defendant made an erection on the demanded premises annexed or attached to and adjoining the water of plaintiff by driving down piles, capping them and covering over the space with lumber and planking so that the particular piece of land was entirely reclaimed from the water and continued to fill up until it became totally unfit for any purpose of navigation, and it also became a permanent accretion by artificial and natural causes to plaintiff's water lot, which the defendant used as a wharf and landing for vessels, and the plaintiff sued in ejectment. The court held that the findings made a case of purpresture or encroachment by the erection of a wharf in a public harbor, and not a case of marine increase by alluvion. The plaintiff claimed that he was a riparian owner and had the right to "wharf out" against his own land and that, therefore, the wharf, though built by the defendant inured to plaintiff's advantage, and that the right of entry vested in him and not in the people.

A riparian proprietor on navigable water has no right to "wharf out" against his own land. By the common law any erection below high water mark without license is regarded as an encroachment or intrusion on the King's soil, which the King may demolish, seize or arrent at his pleasure. This shows decisively that in cases of purpresture the right of entry is not in the adjacent land owner but in the Crown. It has been held in some of the states that the riparian proprietor owns the soil between high and low water mark, or at least that he is so far interested in it that he can "wharf out" to the line of low water as against the people, if the wharf does not amount to a nuisance. But these decisions are all based upon local legislation, or local usage. The court in this case says that the plaintiff is not a riparian proprietor in the sense in which that term is used in the law of tide waters. He is not an "owner" upon the shore, but upon a wafer front of statute creation. The water front is what the act of its establishment made it, and the rights of the owner of a beach and water front abutting on it exist only in subordination to that act of the legislature. If the water front could be extended on the ground of marine increase by reliction or alluvion or by another kind of accretion, so that the owner of the water lot immediately adjacent would have a right of entry thereon to the exclusion of the state, then the water front line as established by the act would or might be an ever-shifting instead of a permanent line. There is another reason why rights incident to ownership upon the shore of navigable waters cannot be considered as incident to ownership upon the "water front" in the harbor of San Francisco. "Shore" is the space between high and low water mark. Against the plaintiff's water lot there is no such space. The water front at that point is below low water mark, and there can be no riparian right to build a wharf or pier beyond it, and it follows that if a stranger should build below the line of low water, the owner of the adjacent land would have no right of entry upon it on which he could maintain ejectment.[9]

In the case of the People v. Vanderbilt, 28 N. Y. 396, the defendant sank a crib and was constructing the proposed pier further into the waters of the bay and North River than any person could lawfully erect one according to Chap. 763, Laws of 1857, or Chap. 522, Laws 1860. This crib and proposed pier were a purpresture and were *per se a* public nuisance. In deciding

(8) People v. Kirk, 168 Ill., l. c. 147.

(9) Dana v. Jackson St. Wharf Co., 31 Cal. 118.

the case the court quotes from the case of Attorney-General v. Richards, 2 Anst. 603, as follows: "The information stated that the defendants had erected a wharf or key, two docks and other buildings between high and low water mark in Portsmouth harbor so as to prevent boats and vessels sailing over that spot or mooring there, etc., and prayed that they be restrained from making any further erections, and also that those made might be abated and the harbor restored to its ancient situation, and the court granted the prayer and decreed that the buildings be abated." Following this precedent the court in the Vanderbilt case, decreed that the defendant be restrained from erecting the proposed pier and that he remove the crib.

In the case of Attorney-General v. Richards[10] the defendants claimed under an ancient grant, the court said: "But it appears that instead of their having possession, the Crown has, by its subjects, had possession of the place in question; and its being open as a public passage from 1629 precludes any right now (1796) to question the title of the Crown. If the grantees ever had any title it has been abandoned. But it is argued that the prayer of the bill being to abate the erections as a nuisance, the court can only consider the question as alone supporting the relief prayed; and it is contended that this court cannot give such a decree, or at least, not without the intervention of a jury, the question being as laid down by Lord Hale, a question of fact, and not of law. That may be where the question is of nuisance only, and the evidence doubtful. But the cases cited and those which Lord Hale has given us in the Treatise De Portibus Maris, clearly prove that when the King claims and proves a right to the soil where a purpresture and nuisance have been committed, he may have a decree to abate it."

As a navigable river the Sacramento is a great public highway, in which the people of the state have paramount and controlling rights. These rights consist chiefly of a right of property in the soil and a right to the use of the water flowing over it, for the purpose of transportation and commercial intercourse. The soil of a navigable river is the alvons or bed of the river. The river itself is the water flowing in its channel. An unauthorized invasion of the rights of the public to navigate the water flowing over the soil is a public nuisance, and the unauthorized encroachment upon the soil itself is known in law as a purpresture. Purpresture is also a particular kind of a nuisance.[11]

A structure built upon the bed of a lake, not in aid of navigation, such as a building in which to store and repair boats is a purpresture.[12]

The whole doctrine of accretions rests upon the right of access to the water and it must be convenient access. The right to preserve his contact with the water is one of the most valuable of a riparian owner. In all cases where practicable every proprietor is entitled to a frontage of the same width on the new line as on the old shore. The line at which the water usually stands when free from disturbing causes, is the boundary of land calling for a lake as a line.[13]

The land below high water mark upon a navigable river, and which constitutes a part of its bed, belongs to the state in its sovereign capacity, subject to the riparian rights of the owner of the land above and adjacent thereto. The state, however, cannot sell it, nor can the state control its use, except to increase the facilities for navigation and commerce. Nor can the riparian proprietor grant such land or any right thereto, except such right as he himself is entitled to enjoy. He can only grant the franchise. This is an incorporeal hereditament. An action in the nature of ejectment will not lie to recover possession of

(10) Cases in Exchequer, Trinity Term, 35 George 111 (1796) 2 Anst. p. 603.

(11) People v. Mining Co., 66 Cal. 138.

(12) Attorney-General v. Smith, 109 Wis. 532.

(13) City of Peoria v. Bank, 224 Ill. 56.

an incorporeal thing, as no possession can be given of such species of property.[14]

The riparian proprietor has the unquestionable and exclusive right to construct and maintain suitable landing, piers, and wharves into the water and up to the point of navigation, for his own private use and benefit. And it is absolutely immaterial, if the public interests be not prejudiced, whether the submerged lands be covered with wharves of timber or stone, or be reclaimed from the water by filling in with earth so that it becomes dry land. The land may be so reclaimed. As the right of private use and enjoyment of the improved or reclaimed premises will continue, so long at least as it does not interfere with the limited and defined public interests, it is obvious that it may continue forever.[15] This exclusive right of the riparian proprietor to improve, reclaim and occupy the submerged land out to the point of navigability for his own private purpose, limited only by the public interests of the state for the purposes of navigation, is recognized and protected by the law of property of which he cannot be deprived, even by the state, without just compensation.[16]

Whether the fee in this "made land" would be in the state or the riparian owner —that is, whether it partakes of the nature of the bed of the stream upon which it is made, or of the shore to which it is added —may be a question of speculative interest, but it is not of any practicable importance. If the fee be in the riparian owner, yet of course it must be a qualified fee, that is, subject to the paramount right of navigation. But if it be in the state, the riparian owner still has, subject to this same public right, the exclusive right of possession and the entire beneficial interest.[17]

(14) Parker v. West Coast Packing Co., (Oregon) 5 L. R. A. 62.

(15) Hanford v. Ry. Co., (Minn.) 7 L. R. A. 725.

(16) Hanford v. Ry. Co., (Minn.) 7 L. R. A. 725; Union Depot, etc., Co. v. Brunswick, 31 Minn. l. c. 301.

(17) Ib.

The state of Texas owns a large body of public lands. In 1884 the legislature passed an act making it unlawful to fence or enclose and keep enclosed the public lands of the state. A party fenced a portion of these lands and the Attorney-General brought suit for mandatory injunction to compel the removal of the fences already built and to restrain the construction of additional fences. A demurrer to the petition was sustained in the trial court, and on appeal the Supreme Court held that this was error, saying: "We think the enclosures set forth in the petition both a purpresture and a public nuisance" (quoting from Wood the definition of a purpresture). "This is an obstruction of a right which the state before the act of 1884 might have waived, but since the passage of that act it becomes the duty of its proper officer to remove by legal proceedings. The enclosure of public lands for private use, whether viewed as a wrong merely to the body politic, or an infringement of the rights of its citizens is a nuisance, subject to be abated at the suit of the state, and an injunction is a well recognized and appropriate remedy. It is claimed that because the act of 1884 makes the enclosure of public land a penal offense, and provides for the prosecution and punishment of offenders against it, that, therefore, a court of equity will not interfere. But this proposition cannot be maintained. Public nuisances were indictable at common law, and yet always were a subject to be enjoined."[18]

The unlawful construction of a railroad, or statue, or any building, in a public park, is a purpresture. It may or may not be a nuisance, for every purpresture is not a nuisance. In the case of a park, if it unlawfully obstructs the free passage or use in the customary manner of the park by the public, it is a nuisance and may be abated by a court of equity. If it falls short of this, the remedy is not by the people, who are not injured, but by the holder of the

(18) State v. Goodnight, 70 Tex. 682.

legal title. Whether or not an incroachment upon a public or private right is a nuisance is a question of fact to be determined by a jury or by a court sitting as a jury. If a railroad is built upon a park with the city's permission, and it works no injury to the public, the city as the trustee of the public holding the legal title can alone maintain an action to remove it. It may well be that if the railroad has been constructed upon the city's property without authority, it will elect to recover it in ejectment and hold it, as in case of a mere purpresture it may do. But a private citizen not being vested with the title, and having no rights in the property, beyond that of seeing that the people are not wronged by being deprived of their rights in and to the use of the park, is not in a position to obtain relief.[19]

The doctrine of purpresture applies to all public real property owned by a county, city, state or general government and held in trust for the use and benefit of the general public. It will therefore be seen that wherever public real property so owned and held is encroached upon, and its free use and enjoyment by the public in the way and according to the purpose for which it is intended, are prevented, it is both a purpresture and a public nuisance, and the remedy is by indictment; but where the purpresture does not interfere with the use and enjoyment of the property by the people, it then only affects the title. and the remedy is by an action in behalf of the state or other public authority in whom the title is vested. A purpresture may, of course, be the subject of an action for damages, and of a suit to enjoin and abate it by a private individual if it is also a public nuisance and if he pleads and proves special damage to himself resulting therefrom.

W. W. HERRON.

St. Louis. Mo.

(19) People v. Park and Ocean R. R. Co., 76 Cal. 161.

STATUTE OF FRAUDS.—ORIGINAL PROMISE.

SOUTHERN COAL & COKE CO. v. RANDALL.

(Supreme Court of Georgia. Nov. 15, 1913.)

80 S. E. 285.

Where one person, desiring that certain shipments of coal be made to another, stated to the prospective vendor that if the shipments were made he would "guarantee the payment of the account," such an undertaking, in the absence of qualifying words or terms, or evidence showing that the promise was an original, independent undertaking, was in the nature of a guaranty and not binding when not in writing.

The Southern Lime Manufacturing Company, hereinafter referred to as the lime company, was a corporation of Polk county, Ga. Randall, the defendant, was a stockholder and the president of that corporation. The Southern Coal & Coke Company, hereinafter called the coal company, had been shipping coal to the lime company and had a claim against it for unpaid bills. Pratt, a representative of the coal company, came to Atlanta to make collection of the claim and requested payment of Randall, who made certain statements as to the affairs of the lime company. After this other shipments of coal were made to the lime company by the coal company. They were not paid for, and suit was brought against Randall to recover the purchase price of them.

The testimony showed that Randall, after making to Pratt statements in the nature of an excuse for a failure of the lime company to pay its debts, stated further that the lime company would "be on their feet pretty soon;" that they liked this particular coal especially well; and that if the plaintiff would make additional shipments Randall would guarantee the payment of the account. Pratt testified further: "I took this matter up with my people and told them that he was a man I regarded as a man of his word, and that he had a responsible position, and (I) felt sure we would be perfectly safe in making these shipments on his agreement to pay for them himself. That was the entire conversation, or the substance of it. We cut off future shipments entirely and would not have made any additional shipments to the Southern Lime Manufacturing Company on their own responsibility. The reason future shipments were made was on the promise of Mr. Randall to pay for the coal. Plaintiff made shipments to the South-

ern Lime Manufacturing Company after the promise of Mr. Randall, but I do not know the amount. * * * Mr. Randall stated to me verbally that if we would make future shipments he would guarantee they were paid. * * * These shipments are handled by the shipping clerk. I did not make a shipment myself. So far as I know, the future shipments were made to the Southern Lime Manufacturing Company and charged to them." As to the liability for the future shipments, "we had nothing in mind except the promise of Mr. Randall to pay for those, if the Southern Lime Manufacturing Company did not pay for the shipments that had been made previously, and which were due at that time, and which he promised to pay in a few days. I do not know whether the future shipments were charged to Mr. Randall or not. I did not make any of the entries. We relied on Mr. Randall to pay for the coal. The plaintiff sued the Southern Lime Manufacturing Company for the shipments made previously to said 24th (of February, 1908), and for those subsequently made also, in the city court of Atlanta. I do not know whether future shipments were made charged to the Southern Lime Manufacturing Company or to Mr. Randall. * * * I communicated the facts contained in this new contract to the plaintiff in Knoxville, and it was necessary to do so in order to get future shipments. I took this matter up with them personally when I got back home * * * a few days after said 24th. I told them of the entire conversation. * * * I told the plaintiff that I believed Mr. Randall was responsible for any guaranty he might make, and we would be perfectly safe in making any future shipments, and we would get our money. * * * As near as I can get to the exact words used by Mr. Randall, they were these: 'If you will continue to make us shipments, so that we can operate the plant and fill some orders that we have got and get the thing in a little better shape you will not lose any money by it. I will guarantee the payment of the account myself."

It appeared that the lime company had been declared a bankrupt, and that the plaintiff proved in the bankrupt court the debt here sued on. The court, at the conclusion of the evidence, granted a nonsuit, and the plaintiff excepted.

BECK, J. (after stating the facts as above). It is clear from the testimony that the substance of Randall's undertaking or promise upon which the plaintiff bases the claim of a right to recover against him individually is embodied in the words "If you will continue to make us shipments, so that we can operate the plant and fill some orders that we have got and get the thing in a little better shape, you will not lose any money by it. I will guarantee the payment of the account myself." The words "us" and "we," as used in this agreement, meant evidently the corporation in which Randall was a stockholder, and of which he was president, and to which he was desirous of having other shipments of coal made. That being true, on the face of it the agreement or promise of Randall was an undertaking in the nature of a guaranty or suretyship; whether the one or the other need not be discussed here, for it is necessary, in order to render such an obligation or promise binding, that it be in writing. In the present case it rested in parol. The words, "I will guarantee the payment," imported the undertaking for one employing the expression to answer for the debt or default of another as a guarantor, in the absence of qualifying terms which might have been the effect of showing that the undertaking was an original independent one and not collateral. Here there were no such qualifying terms. If it should be held that, under the language used by the parties, evidence was admissible to show that the word "guarantee" was not used in its legal signification, but that the real intent of the parties was that the promise was an original one, then there was no such evidence. On the contrary, it may be inferred from the evidence that the coal was charged to the lime company, not to the defendant, for that company was sued in the city court; and when the lime company went into bankruptcy the plaintiff proved its claim in the bankrupt court, thus indicating that it considered the lime company as its debtor. In the petition the plaintiff clearly alleged an independent and original undertaking on the part of Randall to pay for the coal shipped after February 24, 1908; but there was no proof to sustain this contention, and the court did not err in granting a nonsuit.

Judgment affirmed. All the Justices concur.

NOTE.—*Evidence of Circumstances to Show That a Verbal Promise Was an Original and Not a Collateral Promise.*—The instant case seems to go no further than to hold that the words used were of no ambiguity whatever, and it may be that some of those following herein are not opposed to it. It was said there were no qualifying terms in the agreement as phrased and no evidence to show the word "guarantee" was not used in its legal signification. So therefore, while the case is somewhat indecisive, it presents an opportunity in annotation to show that, if there is any ambiguity in the words of the promisor, the surrounding circumstances may be gone into to

explain whether they create an original or collateral promise.

Two cases in Oklahoma show facts as follows: In one: "R. (defendant) said to M. (plaintiff), a physician, 'I want you to go to that little house (pointing same out). My tenant's wife, Mrs. B., is sick there; and I want you to look after her and take care of her.' M. asked him about the pay, and he said, 'I will see that it is paid.' It was in answer to M.'s question about his pay for such service as M. might render to Mrs. B. that he said: 'I will see that it is paid.'" This evidence was excluded from the jury and judgment was rendered for defendant. The Supreme Court reversed on the ground, that there was a question for the jury whether credit was given solely to defendant, or to the husband of the woman treated, with defendant to pay in case the husband did not. May v. Roberts, 28 Okla. 619, 115 Pac. 771. The opinion cites and quotes from quite a number of cases.

In the other case the evidence showed that a father introduced his son to a merchant saying he wanted the merchant to let his son have some groceries and he "went on to say that whatever he got he would see that it was all right and paid for." He also told the merchant that he and his two sons were farming together, but what one got they were all good for and he told the merchant "to keep the account separate, so that they would know," what each got. There was held here to be a question of fact as to whether credit was given to the three jointly or to the son introduced by the father upon the understanding that if he did not pay the other two would.

In Peele v. Powell, 156 N. C. 553, 73 S. E. 234, there is a strong dissenting opinion, concurred in by one of the five members of the court, to the majority holding that evidence that defendant's tenant had no credit and that decedent told plaintiff to let him have goods and he would see that they were paid for showed only a collateral promise. This dissent quotes from Emerson v. Slater, 63 U. S. 28, 43: "Whenever the main purpose and object of the promissor is not to answer for another but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance if it may incidentally have the effect of extinguishing that liability." The dissent thought it should have gave to the jury, at least whether the landlord's main purpose was to have his tenant supplied with groceries to enable him to work his crop. To the same effect as the Emerson case is Davis v. Patrick, 141 N. S. 479. The dissent also thought that testimony that the tenant had no credit was of itself a circumstance that should have carried the question to a jury, where language of promise was as ambiguous as that shown.

At the same term of this court, the dissenting judge in the Peele case spoke for a full bench in Whitehurst v. Padgett, 157 N. C., 73 S. E. 240, in holding there was a jury question where a landlord told plaintiff to "go ahead and furnish Padgett (his tenant) and I will see that you get your money, and after goods were furnished, he said: "I will see that you get your money, If I do not get a cent," the debt being for fertilizers to make a crop on the rented premises. It was held there was a question for the jury, they having a right to consider that the landlord "had a direct, personal and pecuniary interest in the transaction," in determining whether or not an original or collateral promise was intended. It was thought it would not be right to allow the promissor to rely on statute of frauds which was intended to prevent frauds and not operate as a cloak therefor.

In May v. Walker, 20 Super Ct. 581, the facts show introduction by contractor of a subcontractor to a material man and request the latter to furnish to him material for use in the building, and the material man agrees to do so only upon promise of the contractor to "stand good" for the material. This was held to constitute a question of fact, as to whether the promise was within the statute or not. The court said: "It is important to note that the defendants were familiar with the plaintiff and the material he had for use in the building and that the subcontractor was a stranger to the plaintiff, and further that plaintiff was seeking to avoid loss by dealing directly with the defendants. . . . These facts are clearly shown by the testimony and it was purely a question of fact for the jury to determine whether they should be believed."

In Rechman v. Grosfend, 140 Mich. 681, 104 N. W. 331, the facts show a shipment of lumber to a husband either upon his sole credit or as agent of his wife. Before its delivery and while it was in the power of plaintiff to arrest its delivery he stated to his wife that it would not be delivered under the circumstances. She said that if he would leave the lumber there and would ship the balance she would see that it was paid for. The court said there was a question for the jury whether both were liable for the lumber, and they were if plaintiff's testimony was believed.

In Wray v. Cox, 86 Miss. 638, 38 So. 344, the testimony shows that a farm owner brought two tenants to plaintiff's store and asked him if he wanted to furnish them. And he told her he had had a sad experience with tenants on that farm. She told him she would see his accounts paid if he would furnish them, asking that they be kept separate and she would see that they were paid. The court excluded all evidence tending to show that credit was given exclusively to defendant, saying: "The words, 'I will see it paid' import not an original, but a collateral, undertaking. The evidence as a whole indicates clearly that Mrs. Cox only guaranteed the payment of the accounts and undertook to pay if the debtors did not." This case seems not wholly opposed to the others, but it does put the burden on plaintiff to show that the words used were intended to constitute an original contract. It would seem that the distinction that requirement makes about credit being extended in any sense to the party for whose benefit the promise is made, and thus making it his debt, and the promise of the other party then within the statute of frauds, is not suited to the business methods of this age. The primary question ought to be whether goods or services would not be furnished except upon the additional express promise being made. If the primary debtor has no credit at all, the case is proved against the other more easily, while if a seller partly relies on the former and only accepts the latter because he does, the case is impossible. In other

words, while it is easier for a man of some financial responsibility to procure a written guaranty of his debt, it is practically impossible for him to get a verbal one. But if he has no credit at all, any doubtful words in a verbal promise for his benefit, will be construed as intended to be an original promise. There is no theory of protection against frauds and perjuries involved, for if any one is willing to commit those, he will swear to terms of an original promise just as quickly as to terms of a collateral promise.

C.

BOOK REVIEW.

LABATT'S MASTER AND SERVANT. SECOND EDITION.

Mr. C. B. Labatt, of the San Francisco Bar, had become widely known to the profession by his two volume work on Master and Servant issued in 1904, and this monumental successor in eight volumes has back of it the presumption of thorough, painstaking, discriminating authorship. Of course it must be true that the scope of the later work is enlarged, for the multitude of decisions appearing since the first edition alone could not fairly expand it to the proportions of the second edition.

In producing this work it was first thought to add a single volume to the first edition, but the prospect enlarged as the work proceeded and new subjects were taken in, not only because of decision, but also because of legislation. There is evolution along legislative and judicial lines and to keep up with it the author has been assisted by members of the editorial staff of the Lawyer's Co-operative Publishing Company. This evolution, well shown in the free use of opinions in leading cases and intelligent compilation gives opportunity for the reader to judge for himself of its value as definitely marking how far advancement has been made and to forecast its further development. Comment by the author upon opinions stand for each reader upon their persuasiveness or, if not accepted, they accentuate so as to induce the reader to weigh the opinions in a more critical way than he otherwise might.

Mr. Labatt has arranged in excellent order the great mass of matter he and his associates have gathered and the table of contents and index enforces its ready reliability by the practitioner, and treatment persuades to belief in exhaustiveness in respect to phases so far as citation of authority is concerned.

The immense labor involved in this work is indicated by the fact that the table of cases cited alone covers 700 pages and the index more than 400. The text and notes make nearly 9,000 pages, or a total of more than 10,000 pages.

The eight volumes of this great work are of very handsome appearance and enduring nature, the text and notes being in clear readable type, the binding in law buckram and the volumes coming from the Lawyer's Co-operative Publishing Company, Rochester, N. Y., 1913.

HUMOR OF THE LAW.

In a trial in the recorder's court recently the question was asked one dusky damsel, a descendant of Ham:

"Well, Deliah, what's this trouble about?"

"Nothin' 't all, sir; I jes went down to her house, and she axed me why for I been throwin' slams at her. I toll her dat I warn't throwin' no slams, dat I jes come down to insult wid her, an' to ax her whose husband my husband war, mine or hern. Den she poke a shot at me. Dat's all."—The Docket.

A justice of the peace, who had been elevated to the bench upon the organization of a municipal court in his city, was receiving the verdict of the jury in a petty criminal case in which the defendant, fearing the preconceived judgment of the court, had demanded a jury trial. After carefully reading the verdict, he turned to the curious crowd assembled in the courtroom and in a tone of evident disappointment gravely announced in his marked German accent: "Shentlemen, der shury finds der criminal not guilty."—The Docket.

We of the stenographic profession, while thoroughly appreciating the jokes contributed by attorneys at our expense, beg to say that "there are others" who unwittingly make mistakes, and many an attorney woul be often amazed to read an exact transcript of his actual dictation, for it is a known fact among stenographers that even lawyers do not always say what they mean, and that in dictating it is impossible that they can hear themselves as "ithers" often hear them. For example, one of our brilliant attorneys was surprised to learn he had dictated:

"Upon the faithful compliance . . . by the party of the third part with the terms of this contract, . . . then the parties of the first and second parts agree to deliver to the party of the third part the deed above mentioned, together with their said respective wives."—The Docket.

The first jury case tried in the United States District Court held at The Soo, Mich., was United States v. James Newsom. The charge was that of "White Slavery." The defendant was a black man. The woman, whom he was accused of bringing from Superior, Wis., to The Soo, Mich., and consequently across the virtuous lines of two sovereign states, was an exceedingly black woman and gave testimony in the case. Defendant's attorney put everybody in good humor (especially the jurors) when in his address to the jury he said:

"Before you can convict in this case, you must find beyond a reasonable doubt that the woman in the case is a White Slave. If you say that upon your oaths, gentlemen, I suppose we must abide by your verdict. But permit me to say to you, after the case is over, that I feel sure you are color blind."

The jury acquitted the defendant.—The Docket.

WEEKLY DIGEST.

Weekly Digest of All the Current Opinions of All the State and Territorial Courts of Last Resort, and of all the Federal Courts.

1. **Bankruptcy**—Lien.—Bankr. Act, § 67, cl. "f," does not invalidate the lien of a judgment entered within four months prior to the filing of a petition in bankruptcy against the judgment defendant, who is subsequently adjudicated a bankrupt, where he was not insolvent when the judgment was entered.—Keystone Brewing Co. v. Schermer, Pa., 88 Atl. 657.

2. **Beneficial Associations**—Exhausting Remedy.—Where the by-laws of an incorporated beneficial association appointed a certain tribunal to determine controversies between its members as to its offices, the judgment of such tribunal is conclusive on the courts when without fraud after due notice and opportunity to the parties interested to be heard.—Commonwealth v. Heilman, Pa., 88 Atl. 666.

3. **Bigamy**—Foreign Divorce.—Where accused, in the state of New York, married a woman whose first husband had secured a divorce frow her while in a foreign state, she not being personally served with process in that state the marriage was null and void, and would not support a conviction for bigamy; the courts of New York not recognizing the foreign divorce —People v. Shaw, Ill., 102 N. E. 1031.

4. **Bills and Notes**—Law of Place.—The law of the place where a note is payable governs all questions as to the mode of payment, days of grace, protest on nonpayment, the medium of payment, and possibly its negotiability.—Cockburn v. Kinsley, Colo., 135 Pac. 1112.

5. **Carriers of Goods**—Notice of Damage.—Under the Carmack Amendment to Hepburn Act, making any common carrier of interstate goods liable for damages caused by it or any connecting carrier and that no contract shall exempt such carrier from such liablity, notice of damage may be given to the connecting carrier, though the contract of shipment requires notice to the initial carrier.—Overton v. Chicago, R. I. & G. Ry. Co., Tex., 160 S. W. 111.

6.——Special Damages.—Shipper of tables for exhibition at market patronized by dealers in furniture held entitled to recover profits lost by reason of delay in delivery, where carrier was told the purpose of the shipment.—Delta Table & Chair Co. v. Yazoo & M. V. R. Co., Miss., 63 So. 272.

7. **Carriers of Live Stock**—28-Hour Law.—A carrier is not liable for a delay in the shipment of live stock caused solely by compliance with the requirements of the federal Twenty-Eight Hour Law.—Hickey v. Chicago, B. & Q. R. Co., Mo., 160 S. W. 24.

8. **Carriers of Passengers**—Mileage Tickets. —where a carrier sold a mileage contract to plaintiff under schedules imposing no limit on the use of tickets issued in exchange for coupons, it could not, by filing subsequent schedules containing such limitation, alter plaintiff's contract so as to make a ticket issued to him on his mileage coupons subject to such limitation.—Eberle v. Southern Ry. Co., S. C. 79 S. E. 793.

9.——Proximate Cause.—Fatigue and cold, suffered by plaintiff from walking to his destination after being ejected short of that place, from a train which did not stop there, as he was told, when he could have reached it by a later train in time for his purposes, held not the proximate result of his ejection, and therefore not the basis of an action for damages.—Cook v. Beaumont, S. L. & W. Ry. Co., Tex., 160 S. W. 123.

10.——Res Ipsa Loquiter.—Where the electrical disturbance on an electric railway passenger car resulting in injury to a passenger was abnormal, the happening of the accident was sufficient evidence of negligence to require a showing of due care by the carrier.—Blumenthal v. Brooklyn Union Elevated R. Co., 143 N. Y. Supp. 811.

11.——Stations.—Where a railroad company had given a particular transfer company the exclusive right upon the railroad company's trains and premises to solict baggage, etc., defendant will be enjoined at the suit of the company from going upon its premises to solicit patronage.—Denton v. Texas & P. Ry. Co. Tex., 160 S. W. 113.

12. **Charities**—Public Charity.—A college for women, the expense of establishing and maintaining which is provided in part by voluntary contribution, and which has already received large gfts for that purpose, administers a "public charity" within the statute of charitable uses.—Connecticut College for Women v. Calvert, Conn., 88 Atl. 633.

13. **Commerce**—Intoxicating Liquor.—Congress had authority to adopt the Webb-Kenyon act, prohibiting transportation of intoxicating liquors into a state, to be used in violation of the state law, and thereby divesting such shipments of their protection under the commerce clause of the federal Constitution as soon as they reach the state line.—State v. Grier, Del., 88 Atl. 579.

14. **Contempt**—Conditional Judgment.—Conditional judgments of imprisonment may be rendered in contempt cases.—State v. Baltimore & O. R. Co., W. Va., 79 S. E. 834.

15. **Contracts**—Building Contract.—Under a subcontract providing for monthly payments "as per architect's estimate," the work to be completed satisfactorily to the architect, the architect could not determine the compensation due the subcontractor after his discharge by the architect before the completion of the work, where the legality of such discharge was in dispute.—Shoemaker v. Riebe, Pa., 88 Atl. 662.

16.——Consideration.—Agreement of minority stockholder to remain in company's employ held not a sufficient consideration for its assumption of an indebtedness due him from majority stockholders which was to be paid out of profits, where he had already agreed to remain in its employ in consideration of an agreement with a majority stockholder.—National Electric Signaling Co. v. Fessenden, C. C. A. 207 Fed. 915.

17.——Construction.—An oral contract for continuous services will be construed to postpone the time of payment therefor until the promisor's death, or provision made therefor in his will, where the peculiar circumstances of the parties, their confidential relations, and the promisor's declarations clearly indicate that such was the understanding of the parties, though the contract does not expressly provide for such postponement.—Hotsinpiller v. Hotsinpiller, W. Va., 79 S. E. 936.

18.——Finality.—While an agreement may be made by word of mouth, it is not legally enforceable if the parties intend that it shall not be binding until it is put in writing.—Tucker v. Pete Sheeran Bros. & Co., Ky., 160 S. W. 176.

19.——Illegality of Conviction.—The whole consideration of the contract is void if any part thereof is illegal, and it is immaterial whether the illegality consists in a violation of statute or of the common law.—Lloyd v. Robinson, Tex., 160 S. W. 128.

20. **Corporations**—Estoppel.—Persons participating in the character of stockholders in the meetings of the corporation and in the conduct of its business by paying calls assessed against them, and in other ways, are estopped to deny that they are stockholders as against the corporation or its receiver.—Guilbert v. Kessinger, Mo., 160 S. W. 17.

21.——Fraud.—If the seller of stock, sold upon representations that the corporation was solvent and as to its financial condition, should have known from his opportunity to obtain the informaton, the untruth of the representations, he was guilty of making false representations which would vitiate the sale if the other party relied thereon.—Grant v. Ledwidge, Ark., 160 S. W. 200.

22.——Inventory.—Partners having transferred a part of their assets to a corporation, which assumed the partnership debts, the holder of a claim against the firm, in the absence of a showing that he could not obtain payment by enforcing the partners' liability, was not entitled to prove the claim against the corporation's assets in insolvency, on the theory of subrogation to the rights of the partners.—Smith v. Bowker Torrey Co., U. S. D. C., 207 Fed. 967.

23.——Merger.—The fact that one person owns all the stock in a corporation does not merge his identity with that of the corporation.—Martin v. D. B. Martin Co., Del., 85 Atl. 612.

24.——Preferred Stock.—Holders of preferred stock are not creditors.—National Electric Signaling Co. v. Fessenden, C. C. A., 207 Fed. 915.

25. **Covenants**—Deed Poll.—The grantee in a deed poll, containing covenants and stipulations purporting to bind him, becomes bound for their performance, though he does not execute the deed.—Herring v. Wallace Lumber Co., N. C., 79 S. E. 876.

26. **Criminal Evidence**—Alibi.—To establish an alibi, the evidence must exclude the possibility of defendant's presence but need not establish the impossibility of his presence beyond a reasonable doubt.—Evans v. State, Ga., 79 S. E. 916.

27.——Confession.—Where independent evidence was sufficient to show the commission of an offense by some one, the extrajudicial confession of accused to his business partner was sufficient to sustain his conviction, though the evidence of the latter was strongly discredited.—Ivey v. State, Ark., 160 S. W. 208.

28.——Dying Declarations.—Declaration of deceased that, if it had not been for his fault, the difficulty would not have occurred, which was neither a part of the res gestae nor a dying declaration, held properly excluded as a mere expression of opinion.—Fisher v. State, Ark., 160 S. W. 210.

29. **Criminal Law**—Instructions.—The effect of prejudicial argument of the district attorney on matters outside the record was not cured where the judge did not rule on objections made thereto, though, after charging the jury, he instructed them in general terms to disregard all remarks of the district attorney which were objected to by defendant's counsel.—State v. Dwyer, La., 63 So. 305.

30.——Prejudice.—One accused of an infamous crime as incest does not show prejudice of the inhabitants of the county by showing that, in the selection of the jurors, a juror indicated that he had a greater prejudice agaist the crime of incest than other penitentiary offenses.—People v. Turner, Ill., 102 N. E. 1036.

31. **Damages**—Exemplary.—If a tort is committed under such circumstances that a person of ordinary reason and prudence would have been conscious of it as such, punitive damages may be inflicted though there is no willful intent.—Eberle v. Southern Ry. Co., S. C., 79 S. E. 793.

32.——Second-hand Goods.—The measure of damages for injuries to secondhand goods and wearing apparel is the difference in their actual value just prior to and just after the injury, and not the difference in the market value of similar goods at secondhand stores at or nearest their destination.—Galveston, H. & S. A. Ry. Co. v. Wallraven, Tex., 160 S. W. 116.

33. **Descent and Distribution**—Gift.—A husband may, as against his dependent heirs, make a gift to his wife of his realty, when no rights of creditors interfere.—Clester v. Clester, Kan., 135 Pac. 996.

34. **Divorce**—Conveyance to Defeat Rights.—A man cannot convey without consideration his realty just before his marriage, without the consent of his fiancee so as to deprive her of her rights as a wife therein, but the conveyance will not be set aside on the theory that she might possibly in the future acquire alimony rights, etc., therein.—Deke v. Huenkemeier, Ill., 102 N. E. 1059.

35.——Custody of Child.—A divorce decree, awarding the custody and maintenance of a child to the mother, the successful party, will not be modified to compel the father to maintain the child in absence of a showing that the mother is unable to do so.—Earle v. Earle, 143 N. Y. Supp. 841.

36. **Embezzlement**—Indictment.—An indictment for embezzlement from an unincorporated association or partnership need not allege the names of the persons composing the association. Hughes v. State, Ark., 160 S. W. 209.

37. **Eminent Domain**—Abutting Owner.—Deprivation of accustomed means of approach, and annoyance from vibration and dust caused by shaft to sewer being constructed under street, held not a taking of an abutting owner's property for public use without compensation.—Pfeifer v. Passaic Valley Sewerage Com'rs, N. J., 88 Atl. 630.

38.——Injunction.—The taking of private personal property for public use without payment of just compensation therefor may be enjoined. —State v. Baltimore & O. R. Co., W. Va., 79 S. E. 834.

39.——Public Benefit.—Development of the water power of the state is a public benefit, which it may promote by delegating the power of eminent domain for that purpose, even to a private corporation which is acting primarily for its prvate benefit.—Connecticut College for Women v. Calvert, Conn., 88 Atl. 633.

40. **Equity**—Practice.—While relief against plaintiff may, in certain cases, be given to the defendant on an ordinary answer to a bill in equity, no such relief can be given against a codefendant.—Freeman v. Egnor, W. Va., 79 S. E. 824.

41. **Executors and Administrators**—Collateral Attack.—Where the probate court has jurisdiction to appoint an administrator, the appointment cannot be collaterally attacked.—In re Brown's Estate, S. C., 79 S. E. 791.

42.——Counsel Fees.—Where an executor under a will probated in common form is called upon by heirs to probate it in solemn form, he is entitled to an allowance from the estate for reasonable attorney's fees, though the will may be refused probate.—Davison v. Sibley, Ga., 79 S. E. 855.

43.——Fiduciary Relation.—Where a person who occupies a fiduciary relation as an administrator deals with the property in his care to his own advantage, the burden is upon him, when the transaction is attacked for fraud, to prove that he acted in good faith.—Taylor v. Taylor, Ill., 102 N. E. 1086.

44. **Factors**—Discretion.—Where a cotton factor has advanced large sums on cotton shipments, so that his interest in the cotton equals or exceeds that of the owner, he may exercise his discretion as to the time of selling the cotton even in disregard of the owner's instructions, providing he acts with due regard both to his own interest and that of the owner.—John Flannery Co. v. James, Ga., 79 S. E. 912.

45. **Fixtures** — Plumbing Appliances.—That plumbing appliances placed in a residence are necessary to render the building wholly usable for residential purposes does not exclude them from the rules governing conditional sales o personalty.—Leibowitz v. Joseph B. Thomson Real Estate Co., 143 N. Y. Supp. 802.

46. **Fraud**—Misrepresentation.—A misrepresentation of facts may be fraudulent in equity though made by one who honestly believed it to be true, if he was under an obligation to ascertain the truth thereof.—Grant v. Ledwidge, Ark., 160 S. W. 200.

47. **Fraudulent Conveyance** — Heirs.—Where there are no creditors, a husband has a right to make a voluntary conveyance of his property to his wife, and his heirs cannot attack such conveyance for want of no consideration.—Rhodes v. Meredith, Ill., 102 N. E. 1063.

48.——Subsequent Creditor.—In order for a subsequent creditor to impeach a voluntary conveyance by a debtor prior to the creation of his debt, he must show an actual intent to defraud.—Buchanan v. Williams, Ark., 160 S. W. 190.

49. **Gaming**—Checks.—Checks given for money to be used in gambling cannot be collected as between the drawer and payee so that payment of such checks may be stopped by the drawer.—Lloyd v. Robinson, Tex., 160 S. W. 128.

50. **Gifts**—Delivery.—To constitute a gift there must be a delivery, either actual, constructive, or symbolical, which passes dominion and control of the subject-matter to the donee. —Meyers v. Albert, Wash., 135 Pac. 1003.

51. **Homicide**—Dying Declarations.—That a dying statement, not reduced to writing, was made by one in articulo mortis previous to a statement which was thereafter reduced to writing, did not render the prior oral statement inadmissible—Odum v. State, Ga., 79 S. E. 858.

52. **Husband and Wife**—Alienation of Affections.—In an action by a husband for alienation of affections alleging adultery, consent of the wife is no defense.—Powell v. Strickland, N. C., 79 S. E. 872.

53.——Antenuptial Contract.—To affect property, subsequently acquired by either spouse in a state foreign to the place of contract, an antenuptial contract must specifically include such a property.—Clark v. Baker, Wash., 135 Pac. 1025.

54.——Joinder in Deed.—A husband may convey his realty without his wife joining with him, and if there be no homestead the grantee receives a fee-simple title, subject only to dower should the wife survive the husband.—Deke v. Huenkemeier, Ill., 102 N. E. 1059.

55. **Indictment and Information**—Motion to Quash.—An indictment which shows on its face that the offense charge is barred by limitations is insufficient, and the question is properly

raised by motion to quash.—People v. Hallberg, Ill., 102 N. E. 1005.

56. **Infants**—Disaffirmance.—Where an infant on becoming of age elected to rescind an exchange of land during infancy, he was bound to quitclaim the land received in the exchange. Coe v. Moon, Ill., 102 N. E. 1074.

57. **Injunction**—Remedy at Law.—The invalidity of a void judgment could be set up as a defense in a scire facias proceeding to revive the judgment; and hence an injunction sought against the scire facias proceeding was properly denied.—Bell v. Verdel, Ga., 79 S. E. 849.

58. **Insurance**—Conditional Delivery.—While a binding contract of insurance may arise from the acceptance by the company of an application, without a policy being issued thereon, a provision that the contract shall not become effective until the policy is delivered is valid.—Pierce v. New York Life Ins. Co., Mo., 160 S. W. 40.

59.——Death from Violation of Law.—Where the fraternal benefit certificate sued on provided that it should be void if insured died in consequence of an attempted violation of the law, it was error to exclude evidence that insured was killed while violating the law by making an unlawful assault upon the marshal who killed him.—Eminent Household of Columbian Woodmen v. Howle, Ark., 160 S. W. 238.

60.——Misrepresentation. — Where insured falsely represented that he had not been intimately associated with any one suffering from a transmissible disease within the past year, insurer could not be held to have waived such misrepresentation in the absence of proof or knowledge that the representation was false.—Gardner v. North State Mut. Life Ins. Co., N. C., 79 S. E. 806.

61.——Representations.—Answers by insured in his application for a life policy that he was then in good health, etc., were not warranties but were representations.—Roedel v. John Hancock Mut. Life Ins. Co., Mo., 160 S. W. 44.

62.——Waiver.—A condition against vacancy in a fire policy may be waived, and if proper notice is given the policy remains in force until the insurer terminates the insurance.—Patterson v. American Ins. Co. of Newark, N. J., Mo., 160 S. W. 59.

63. **Landlord and Tenant**—Tenant at Sufferance.—Where a tenant for a year continues in possession without right after expiration of his term, he is a "tenant at sufferance."—Stanley v. Stembridge, Ga., 79 S. E. 842.

64. **Larceny**—Conspiracy to Cheat.—Where several persons, under color of a wager, conspire to cheat another, who merely deposits his money with one of them as a stake, without intending to part with ownership of the same, such persons commit larceny by taking the money, though they are fraudulently made to appear to win the bet.—Coon v. State, Ark., 160 S. W. 226.

65. **Libel and Slander**—Innuendo.—Where, in an action for libel, the words complained of are not in themselves libelous but are alleged to be so by innuendo, the court should instruct as to whether they are libelous, assuming the innuendo to be true; but where they are of dubious import, and their meaning is inferred by innuendo, it is fo the jury to say whether they are used in the sense alleged.—Mengel v. Reading Eagle Co., Pa., 88 Atl. 660.

66.——Slander of Title.—To maintain an action for slander of title, it must appear that the words complained of were false, that they were maliciously spoken, and resulted in pecuniary injury to plaintiff.—Potosi Zinc Co. v. Mahoney, Nev., 135 Pac. 1078.

67. **Limitation of Actions**—Starting Point.—Where an oral contract for continuous services provides that payment therefor shall be postponed until the death of the promissor, or provision made therefor in his will, limitations do not begin to run until the happening of the contemplated event.—Hotsinpillar v. Hotsinpiller, W. Va., 79 S. E. 936.

68. **Master and Servant**—Assumption of Risk.—If a master supplies a mass of materials, some good for one part or purpose in a structure and some for another, and the servants make selections from this, their negligence in doing so will be the acts of fellow servants.—Hedrick v. Kahmann, Mo., 160 S. W. 28.

69.——Child Labor Law.—The employment of a boy in a factory in violation of child labor law, is negligence per se, and renders the employer liable for injuries proximately resulting from the employment.—Elk Cotton Mills v. Grant, Ga., 79 S. E. 836.

70.——Incompetent Servants.—Where a master has not used ordinary care in the selection of servants and an injury results to a coemploye from a fellow servant's negligence, the master will ordinarily be liable.—McMahon v. Owsley, Ill., 102 N. E. 1010.

71.——Independent Contractor.—A contractor to be "independent" must exercise an independent employment and be at liberty to perform the work he undertakes in his own way, at his own time, and by such means as to him seems most suitable within the limits fixed in the contract.—North Bend Lumber Co. v. Chicago, M. & P. S. Ry. Co., Wash., 135 Pac. 1017.

72.——Respondeat Superior.—A master who employs a physician to treat employes, and collects monthly fees from their wages, which are given to the physician as his compensation, is not liable for the physician's malpractice, unless he was negligent in selecting or retaining him.—Guy v. Lanark Fuel Co., W. Va., 79 S. E. 941.

73. **Mechanics' Liens**—Architect.—An architect cannot have a mechanic's lien for his plans, but may assert such a lien if he superintends the work under his plans.—Swasey v. Granite Spring Water Co., 143 N. Y. Supp. 838.

74.——Statement—Inadvertent inclusion of certain nonlienable items in an account for which a mechanic's lien was sought to be enforced, for which plaintiff filed a disclaimer at the trial, held not fatal to the lien.—Kansas City Pump Co. v. Vrooman, Mo., 160 S. W. 48.

75. **Mortgages**—Confidential Relation.—The showing of an inadequate consideration, coupled with a confidential relation between the parties, will always be considered by the court of equity where it is desired to invalidate a contract or a transaction, as to declare a deed absolute on its face a mortgage.—Lynch v. Lynch, Cal., 135 Pac. 1101.

76. **Navigable Waters**—Riparian Rights.—Littoral and riparian rights along a navigable stream or lake attach to the shore lands and pass to one who purchases those lands from the state.—State v. Sturtevant, Wash., 135 Pac. 1035.

77. **Negligence**—Imputable.—A boy employed to assist the driver of a grocery wagon and injured by a collision between the wagon and a

street car, held not chargeable with any negligence of the driver.—Ebert v. Metropolitan St. Ry. Co., Mo., 160 S. W. 34.

78.——Last Clear Chance.—Neither contributory negligence nor voluntary intoxication of the injured person is a defense, if the defendant was negligent in failing to take advantage of the last clear chance to avoid the injury.—Walda v. Ft. Wayne & W. V. Traction Co., Ind., 102 N. E. 978.

79. **Nuisance**—Abatement.—The power of courts of equity to abate or enjoin nuisances is of recent origin, and will be exercised only in extreme cases, at least until after the right and the question of the nuisance have been settled at law.—City of Pana v. Central Washed Coal Co., Ill., 102 N. E. 992.

80.——Prescription.—Prescription cannot run in favor of the maintenance of a railroad embankment constituting a continuing nuisance.—Williams v. Southern Ry Co., Ga., 79 S. E. 850.

81. **Partnership**—Joint Liability.—Where one partner furnished the entire capital and the other his services and a building for the business, the profits and losses to be shared equally, and the property purchased with the capital was destroyed by fire and the business discontinued, the partner furnishing no capital was chargeable with half the loss of stock, though in addition he lost his services and building.—Gore v. Vines, W. Va., 79 S. E. 820.

82. **Payment**—Burden of Proof.—Where, in an action to recover a balance due on an account, defendant's original liability is admitted, the burden is on him to prove payments claimed by him to have been made discharging such liability.—Essex Fertilizer Co. v. Danforth, Me., 88 Atl. 651.

83.——Presumption of.—The giving of a note for a pre-existing indebtedness is prima facie evidence of payment, in the absence of any showing that such was not the intention of the parties.—Knight v. Kerfoot, Ind., 102 N. E. 983.

84. **Poisons**—Burden of Proof.—In a prosecution for an unlawful sale of cocaine, proof of the defense that the sale was made upon a physician's prescription devolves upon the accused.—Miller v. State, Miss., 63 So. 269.

85. **Principal and Agent**—Apparent Authority.—A principal who would escape liability for the acts of his agent done within the apparent scope of the agency on the ground that the agent's authority was limited has the burden of proving the limitation and notice thereof to the third party.—Hiller v. Bank of Columbia, S. C., 79 S. E. 899.

86. **Prohibition** — Excessive Jurisdiction.—Prohibition lies to restrain as excessive jurisdiction as well as to prevent proceedings in a case where the court has no jurisdiction.—State v. Whitney, Fla., 63 So. 299.

87. **Railroads**—Trespasser.—A railroad company owes no duty to a trespasser on its tracks, except to refrain from inflicting on him a willful injury; and, where an injury is the direct result of the trespasser's presence, he cannot recover.—New York, C. & St. L. R. Co. v. Ault, Ind., 102 N. E. 988.

88. **Reformation of Instruments**—Mutual Mistake.—Where there has been a mutual mistake in the execution of a contract or a mistake of one of the parties brought about by the fraud of the other, equity will grant reformation but not for misapprehension of one of the parties as to any facts.—Wilson v. Scarboro, N. C., 79 S. E. 811.

89. **Release**—Rescission.—A release cannot be rescinded for fraud or mistake without the rescinding party restoring all he may have received as consideration for the release.—Indianapolis Abattoir Co. v. Bailey, Ind., 102 N. E. 970.

90. **Sales**—Breach of Warranty.—The measure of damages for breach of warranty that metal shingles were fit for use on a particular building held to be the cost of the shingle roof, including the cost of the shingles and expense of putting them on, less their value after their removal, to which should be added the expense incurred in attempting to repair the roof to conform to the warranty.—Edwards Mfg. Co. v. Stoops, Ind., 102 N. E. 980.

91. **Telegraphs and Telephones**—Agency.—A telegraph company is not relieved of liability for its failure to transmit money to plaintiff D., as it had agreed, by the fact that it had no money order office there; the contract being within the apparent authority of the agent making it, and therefore binding on the company.—Western Union Telegraph Co. v. Sisson, Ky., 160 S. W. 168.

92.——Mental Suffering.—A telegraph company should have reasonably anticipated mental suffering by plaintiff's wife from delay in delivering a telegraphic draft to her, where the company was informed when the message was sent that his wife was ill, and needed the money.—Goodwin v. Western Union Telegraph Co., Tex., 160 S. W. 107.

93. **Torts**—Punitive Damages.—Where a contractor, having agreed to construct a residence for a negro, was prevented from doing so by defendants' threats, the negro was entitled to recover from defendants actual and punitive damages.—Day v. Hunnicutt, Tex., 160 S. W. 134.

94. **Trover and Conversion**—Burden of Proof.—The burden is on the plaintiff in trover to prove not only title but also right of possession where he has by contract surrendered possession to another.—Birmingham Fertilizer Co. v. Dozier, Ga., 79 S. E. 927.

95. **Trusts**—Constructive Trust.—A constructive trust arises whenever property is acquired under circumstances making it inequitable that it be retained.—Clester v. Clester, Kan., 135 Pac. 996.

96. **Vendor and Purchaser**—Estoppel.—Where in an action by a purchaser for breach of contract, defendant based his refusal to perform the contract upon certain specific defenses, he was estopped after litigation began to set up other grounds for his refusal.—Haney v. Hatfield, Pa., 88 Atl. 680.

97.——Rescission.—A person who contracts to buy definitely described land for a definite price for the entire area need not accept a materially less quantity of land, but may rescind and recover the money paid.—Hurford v. Norvall, Okla., 135 Pac. 1060.

98. **Waters and Water Courses**—Easement.—Where the owner of a dam, the land at either end and the millpond, conveys right to construct and maintain a raceway through his land at the east end to the mill of the grantee, to take water from the pond to such mill, and requires each to keep, one the eastern, the other the western, part of the dam in good and constant repair, the water privileges constitute an irrevocable easement.—Barnes v. Martin, 143 N. Y. Supp. 792.

99. **Wills**—Construction.—The courts will construe a legacy as a charge upon land devised rather than as a condition precedent to the vesting of the estate in accordance with the policy to construe an estate vested whenever possible.—Jacobs v. Ditz, Ill., 102 N. E. 1077.

100.——Construction.—The rule that a legacy payable at a future period, unaccompanied by any antecedent substantive bequests independent of the period fixed for payment is presumptively contingent rather than vested is merely a rule of construction which supplies a presumptive intent only when the actual intent is not ascertainable.—In re Paxson's Estate, Pa., 88 Atl. 673.

101.——Lost Will.—A court of equity has no jurisdiction to establish the existence of a lost or destroyed will, as that matter, as well as the probating of the will after it has been established, is within the exclusive jurisdiction of the probate court.—Mather v. Minard, Ill., 102 N. E. 1062.

102.——Undue Influence.—The word "undue" when used to qualify influence has the legal meaning of "wrongful," so that "undue influence" means a wrongful influence, but influence acquired through affection is not wrongful.—Hurd v. Reed, Ill., 102 N. E. 1048.